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February 3, 2012

The Honorable Jocelyn Boyd
Chief Clerk of the Commission
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: BellSouth Telecommunications, LLC d/b/a AT&T South Carolina,
Complainant/Petitioner v. Halo Wireless, Inc., Defendant/Respondent
Docket No.: 2011-304-C

Dear Ms. Boyd:

Enclosed for filing is AT&T South Carolina's Response to Halo's Partial Motion to Dismiss in the above-referenced matter.

By copy of this letter, I am serving all parties of record with a copy of this pleading as indicated on the attached Certificate of Service.

Sincerely,

A handwritten signature in black ink that reads "Patrick W. Turner". The signature is fluid and cursive, with the first name "Patrick" being more prominent.

Patrick W. Turner

PWT/nml
Enclosure
cc: All Parties of Record
1020918

**BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA**

In Re: Complaint and Petition for Relief of)	
BellSouth Telecommunications, LLC d/b/a AT&T)	
Southeast d/b/a AT&T South Carolina v. Halo)	Docket No. 2011-304-C
Wireless, Inc. for Breach of the Parties')	
Interconnection Agreement)	

**AT&T SOUTH CAROLINA'S RESPONSE TO
HALO'S PARTIAL MOTION TO DISMISS**

AT&T South Carolina's Complaint alleges that AT&T South Carolina and Halo entered into an interconnection agreement ("ICA") that was submitted to the Commission for approval pursuant to Section 252(e) of the federal Telecommunications Act of 1996, that Halo has breached that ICA,¹ and that the Commission should grant AT&T South Carolina appropriate relief. The federal courts of appeals have repeatedly held that the 1996 Act entrusts the interpretation and enforcement of ICAs to state commissions, and South Carolina statutes expressly preserve the Commission's authority to resolve issues relating to arrangements and compensation between wireline providers and wireless providers pursuant to Sections 251 and 252 of the 1996 Act. Halo's contention that AT&T South Carolina is actually asking the Commission to construe Halo's CMRS license² and to decide matters within the FCC's exclusive jurisdiction, therefore, are demonstrably wrong, and the rest of Halo's arguments merely dispute

¹ Specifically, as AT&T South Carolina alleged in its Complaint, Halo has breached the ICA by: (1) sending traffic to AT&T South Carolina that is not "wireless originated traffic," as the ICA requires, but is instead, landline-originated intrastate intraLATA, intrastate InterLATA or interstate toll traffic for which switched access charges are due but have not been paid; (2) altering call detail information that is transmitted with the traffic that Halo sends to AT&T South Carolina's network; and (3) failing to pay for certain facilities ordered by Halo pursuant to the ICA.

² AT&T South Carolina's Complaint does not even mention any license the FCC may have granted to Halo, much less ask this Commission to interpret, enforce, alter, or even consider any such license.

the merits of AT&T South Carolina's claims and have no bearing on whether this case should proceed. Accordingly, AT&T South Carolina respectfully requests that the Commission deny Halo's Partial Motion to Dismiss.³

Overview

Halo is relatively new and purports to be a small wireless carrier. By mid-2010, however, numerous carriers across the country, including AT&T South Carolina and other AT&T incumbent local exchange carriers ("ILECs") began realizing that Halo was sending them large volumes of calls, all of which Halo represented as local wireless calls (intraMTA) and therefore subject only to reciprocal compensation rates rather than access charges. Based on their review of call data, several carriers, again including AT&T South Carolina and other AT&T ILECs, determined that much of the traffic Halo was sending them was not, in fact, wireless-originated (as required by the AT&T ILECs' ICAs with Halo) and was not local, and that Halo was engaged in an access charge avoidance scheme. Several AT&T ILECs therefore filed complaints against Halo with state public service commissions for breach of the parties' ICAs. Several other carriers, including TDS and many rural local exchange carriers ("RLECs"), likewise filed complaints against Halo before state commissions, based on the same claims about Halo's business practices. More than 20 cases currently are pending against Halo with state commissions across the country.

Halo has done its utmost to try to prevent this Commission, and others, from reaching a decision on the merits (while in the meantime Halo continues to send millions of minutes of traffic each month to AT&T South Carolina and other carriers, for which Halo is not paying the applicable access charges). Yet Halo's tactics have failed at every turn. Halo began by filing for

³ AT&T South Carolina submits this Response to Halo's Partial Motion to Dismiss in accordance with the Hearing Officer Directive dated December 20, 2011.

bankruptcy on the day before the first evidentiary hearing was supposed to occur before a state commission (in the case brought by TDS Telecom in Georgia)⁴ and claiming that this stayed all the state commission proceedings. The bankruptcy court, however, held it did not. Halo then filed a motion asking the bankruptcy court to “stay” its ruling that the state commission proceedings can proceed, and the bankruptcy court denied Halo’s motion.⁵ So Halo asked the federal district court in Texas to “stay” the bankruptcy court’s decision and enjoin the state commissions from going forward with the pending cases. That too was denied.⁶ Finally, Halo asked the Fifth Circuit for permission to appeal the bankruptcy court’s decision directly to the Fifth Circuit, and to vacate that decision and stay the state commission proceedings while that appeal is pending. The Fifth Circuit allowed Halo to lodge its appeal directly with the Fifth Circuit (without objection from AT&T), but it denied Halo’s request to vacate the bankruptcy court’s decision and to stay the state commission proceedings.⁷

While all that was going on, Halo also removed all the state commission complaint cases to various federal courts, erroneously claiming exclusive federal jurisdiction. The South Carolina bankruptcy court rejected Halo’s argument and remanded AT&T South Carolina’s Complaint to this Commission,⁸ and all five other federal courts to rule on Halo’s removal

⁴ *In re Complaint of TDS Telecom on behalf of its subsidiaries Blue Ridge Tel. Co., et. al. against Halo Wireless, Inc., et al.*, Docket No. 34219 (Pub. Serv. Comm’n, Ga.).

⁵ Order Denying Motions for Stay Pending Appeal, *In re: Halo Wireless, Inc.*, Case No. 11-42464 (Bankr. E.D. Tex., Nov. 1, 2011) (Exhibit “A” hereto).

⁶ Order Denying Emergency Motion for Stay Pending Appeal, *In re: Halo Wireless, Inc., Halo Wireless, Inc. v. Sw. Bell Tel. Co.*, Case No. 4:11-mc-55 (E.D. Tex., Nov. 30, 2011) (Exhibit “B” hereto).

⁷ Order, *Halo Wireless, Inc. v. Alenco Commc’ns, Inc., et al.*, Case No. 11900-50 (5th Cir. Feb 2, 2012) (Exhibit “C” hereto).

⁸ Order Granting Motion to Remand, *BellSouth Telecommc’ns, LLC v. Halo Wireless, Inc.*, C/A No. 11-80162-dd (Bankr. D. S.C., Nov. 30, 2011) (Exhibit “D” hereto).

petitions (Tennessee, Florida, Missouri, Alabama and Georgia) have likewise remanded to the relevant state commission.⁹

Further, in the two other state commission cases that have finally started moving forward, Halo has filed motions to dismiss making the same arguments it makes here. Both state commissions (Tennessee and Wisconsin) denied those motions.¹⁰ AT&T South Carolina respectfully requests that this Commission do the same.

Standard of Review

The standard for a motion to dismiss is clear. A motion to dismiss raises as a question of law the sufficiency of the facts alleged to state a cause of action. *Cole Vision Corp. v. Hobbs*, 714 S.E.2d 537, 539 (S.C. 2011). Halo can prevail on its Motion only if it can show that even if the allegations of AT&T South Carolina's Complaint are true, the Complaint still fails to state a cause of action upon which relief may be granted. *See Charleston County School Dist. v. Harrell*, 713 S.E.2d 604, 607 (S.C. 2011); *HHHunt Corp. v. Town of Lexington*, 699 S.E.2d 699, 705 (S.C. Ct. App. 2010). Further, in considering Halo's Motion, the Commission must construe all material allegations in the Complaint in the light most favorable to AT&T South

⁹ Memorandum, *BellSouth Telecommc'ns, Inc. v. Halo Wireless, Inc.*, No. 3-11-5 (M.D. Tenn., Nov. 1, 2011) (Exhibit "E" hereto); Order of Remand, *BellSouth Telecommunications, LLC v. Halo Wireless, Inc.*, Case No. 4:11cv470-RH/WCS (N.D. Fla., Dec. 9, 2011) (Exhibit "F" hereto); Order, *Alma Commc'ns Co. v. Halo Wireless, Inc., et al.*, Case No. 11-4221-CV-CA-NKL (W.D. Mo., Dec. 21, 2011) (Exhibit "G" hereto); Order, *BellSouth Telecommc'ns, LLC v. Halo Wireless, Inc.*, Case No. 2:11-CV-758-WKW (M.D. Ala. Jan. 26, 2012) (Exhibit "H" hereto); Order, *Halo Wireless, Inc. v. TDS Telecommc'ns Corp.*, Civil Action No. 2:11-CV-158-RWS (N.D. Ga. Jan. 26, 2012) (Exhibit "I" hereto).

¹⁰ Order Denying Motion to Dismiss, *BellSouth Telecomss., LLC v. Halo Wireless, Inc.*, Docket No. 11-00119 (Tenn. Reg. Auth., Dec. 16, 2011) (Exhibit "J" hereto); ruling denying second motion to dismiss (same case) Order, *BellSouth Telecomss., LLC v. Halo Wireless, Inc.*, Docket No. 11-00119 (Tenn. Reg. Auth., Jan. 26, 2011, pp. 3-6) (Exhibit "K" hereto); Order Denying Motions to Dismiss in Part With Prejudice and in Part Without Prejudice, *Investigation into Practices of Halo Wireless, Inc. and Transcom Enhanced Services, Inc.*, No. 9594-TI-11 (Pub. Serv. Comm'n Wis., Jan. 10, 2012) (Exhibit "L" hereto).

Carolina, and with every doubt resolved in favor of AT&T South Carolina. *See Id.* Even a cursory review of AT&T South Carolina's Complaint shows that AT&T South Carolina has alleged breaches of the parties' ICA and that this Commission has jurisdiction to adjudicate AT&T South Carolina's claims.

Argument

A. The Commission has Jurisdiction to Determine Whether Halo is Liable for Breach of its ICA.

AT&T South Carolina's Complaint includes four Counts. Count I alleges that Halo "is materially violating the parties' ICA" by sending traffic to AT&T South Carolina that was not wireless-originated. Complaint ¶ 11. Count II alleges that Halo has "materially breache[d] the ICA" by inserting incorrect Charge Number data in the call information it sends to AT&T South Carolina. *Id.* ¶ 15. Count III follows up on Counts I and II by asking the Commission to find that, because the landline-originated traffic sent by Halo is not permitted by the ICA and is (as the evidence will show) to a large extent interstate or interLATA traffic, such traffic is subject to applicable access charges. *Id.* ¶ 17. Count IV alleges that Halo has breached the ICA by failing to pay for interconnection facilities as required by the ICA. *Id.* ¶¶ 19-21.

Thus, all of AT&T South Carolina's claims relate to breaches of the ICA and the consequences of such breaches. The federal courts of appeals have repeatedly held that the 1996 Act entrusts the interpretation and enforcement of ICAs to state commissions.¹¹ The FCC

¹¹ *E.g., Budget Prepay, Inc. v. AT&T Corp.*, 605 F.3d 273, 278-81 (5th Cir. 2010); *Connect Communications Corp. v. Southwestern Bell Telephone, L.P.*, 467 F.3d 703, 708, 713 (8th Cir. 2006); *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs.*, 317 F.3d 1270, 1277 (11th Cir. 2003); *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1128 (9th Cir. 2003); *Michigan Bell Tel. Co. v. MCImetro Access Trans. Servs., Inc.*, 323 F.3d 348, 362-63 (6th Cir. 2003); *Illinois Bell Tel. Co. v. WorldCom Technologies, Inc.*, 179 F.3d 566, 574 (7th Cir. 1999).

agrees.¹² This Commission, too, has recognized its authority over ICA disputes, stating that “[b]oth state and federal law entrust this Commission to decide [disputes about ICAs] in the first instance, and this Commission is willing and able to carry out its responsibility to do so.”¹³ State statutes make clear that this authority applies with equal force to ICAs between AT&T South Carolina and wireless providers like Halo, expressly preserving the Commission’s “jurisdiction” and “authority” to “address and resolve issues relating to arrangements and compensation between telecommunications carriers and commercial mobile service providers, pursuant to 47 U.S.C. Sections 251 and 252 or pursuant to other applicable provisions of law.”¹⁴ Finally, as noted above, the Tennessee and Wisconsin Commissions have already rejected the arguments Halo makes here in cases involving the same claims by AT&T ILECs. This law defeats Halo’s Motion to Dismiss.¹⁵

Halo brazenly asserts that AT&T South Carolina “do[es] not really seek an interpretation or enforcement of th[e] terms” of the ICA (Motion to Dismiss, ¶¶ 1-2), but the Complaint shows that is exactly what AT&T South Carolina seeks. Complaint, ¶¶ 11, 15, 17, 19-21. Halo claims that AT&T South Carolina is, instead, actually seeking a ruling on “whether Halo is acting within and consistent with its federal license” (Motion to Dismiss, ¶ 1), but the Complaint never mentions Halo’s license, much less seeks an interpretation of it. Finally, Halo claims that state commissions “cannot attempt to impose rate or entry regulation on wireless providers” (*id.*, ¶ 8),

¹² *In the Matter of Starpower Commc’ns*, 15 FCC Rcd. 11277, at ¶ 7 (FCC, 2000).

¹³ Order Ruling on Arbitration, *In Re Joint Petition for Arbitration on Behalf of NewSouth Communications, Corp. , NuVox Communications, Inc. , KMC Telecom V, Inc. , KMC Telecom III, LLC and Xspedius [Affiliates] of an Interconnection Agreement with Bell South Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended*, Order No. 2006-531 in Docket No. 2005-57-C at 17 (October 11, 2006).

¹⁴ See S.C. Code Ann. §58-11-100(D).

¹⁵ Halo apparently does not dispute that the Commission has jurisdiction to decide ICA disputes, because it does not seek dismissal of Count IV, presumably because even Halo cannot pretend that that claim is anything but a breach of ICA claim.

but AT&T South Carolina's Complaint does not raise that issue, either. Halo has already entered the market, and AT&T's Complaint does not take issue with any rates Halo may be charging to any of its customers. The question raised by AT&T South Carolina's Complaint is whether Halo is now breaching the ICA it signed with AT&T South Carolina, and as explained above, the Commission clearly has jurisdiction and authority to resolve that question.¹⁶

B. Halo's Factual Arguments Also Defeat its Motion to Dismiss.

Most of Halo's motion is devoted to disputing the *factual* allegations in AT&T South Carolina's Complaint. For example, Halo disputes at length AT&T South Carolina's allegation that Halo is breaching the parties' ICA by sending AT&T South Carolina landline-originated traffic, arguing that the traffic Halo is sending AT&T South Carolina actually originates from wireless equipment.¹⁷ Similarly, Halo disputes at length AT&T South Carolina's allegation that Halo is breaching the ICA by altering call detail, arguing that it is in fact providing proper call detail.¹⁸ AT&T South Carolina will prove in due course that its factual allegations are true. For present purposes, though, the point is that *factual* disputes are not a basis for dismissing a complaint; on the contrary, the very purpose of the proceeding that Halo desperately seeks to avoid is to determine the truth of the matter. As explained above, however, AT&T South Carolina's factual allegations must be taken as true for purposes of deciding Halo's Motion to

¹⁶ As noted above, the Tennessee Regulatory Authority ("TRA") denied Halo's identical motion to dismiss. The TRA received prefiled testimony from both parties, conducted a day-long evidentiary hearing, and, on January 23, 2011, after hearing oral argument, granted AT&T Tennessee the relief it requested. In the entire Tennessee proceeding, AT&T Tennessee offered no evidence concerning Halo's CMRS license, and there was no argument or debate about that license, or about the imposition of any rate or entry regulation on Halo – the matters that Halo erroneously claims AT&T is seeking to raise. Nor will there be any such evidence, argument or debate in this proceeding - except to the extent that Halo itself may continue to try to lead the Commission to believe that that is what the case is about.

¹⁷ Motion at 7-11.

¹⁸ *Id.* at 12-16.

Dismiss. *See supra* at 4. The existence of a factual dispute is precisely the reason that an evidentiary record is needed and Halo's motion to dismiss must be denied.

Moreover, in its recent decision establishing the Connect American Fund, the FCC expressly considered and soundly rejected Halo's argument that the traffic at issue is wireless traffic, and it reaffirmed that the type of traffic Halo is delivering to AT&T is actually landline-originated traffic. *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90 *et al.*, FCC 11-161, 2011 WL 5844975, at ¶¶ 1005-06 (rel. Nov. 18, 2011) (singling out Halo by name and squarely rejecting Halo's theory that these landline-originated calls are somehow "re-originated" and thus converted from wireline to CMRS).¹⁹ Indeed, the FCC specifically found that such calls are not CMRS-originated for purposes of intercarrier compensation. *Id.* Thus, the FCC has underscored, in plain language, that Halo's argument has no merit – Halo cannot magically transform a landline call into a wireless call by purportedly "re-originating" that traffic.

C. AT&T South Carolina Will Not Seek Any Relief Beyond That Authorized by the Bankruptcy Court.

AT&T filed its complaint before Halo filed for bankruptcy. The court in Halo's bankruptcy case has since held that the automatic bankruptcy stay does not apply to state commission proceedings like this one. In that order, the bankruptcy court indicated that state commissions can "determine that the Debtor [Halo] has violated applicable law over which the particular state commission has jurisdiction," and it explained that state commissions should not

¹⁹ In a status conference before the Tennessee Regulatory Authority on November 21, 2011, counsel for Halo conceded that the FCC "disagreed with Halo" and went on to explain that Halo contends that the FCC was simply "incorrect in the way they addressed it." Transcript of Proceeding, *In re Complaint of Concord Tel. Exchange, Inc., et al. against Halo Wireless, Inc.*, Docket No. 11-00108, at 26 (Nov. 21, 2011) (Exhibit "M" hereto).

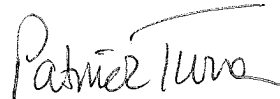
issue relief involving “liquidation of the amount of any claim against the Debtor.”²⁰ AT&T South Carolina will continue to monitor the bankruptcy proceedings and, at or before the hearing on the merits, AT&T South Carolina will specify the relief it is seeking and explain how that requested relief is permissible in light of the status of the bankruptcy proceedings at that time.²¹

Conclusion

WHEREFORE, for the foregoing reasons, AT&T South Carolina respectfully requests that Halo’s Partial Motion to Dismiss be denied.

Respectfully submitted this 3rd day of February, 2012.

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²⁰ *In re Halo Wireless, Inc.*, Order Granting Motion of the AT&T Companies to Determine Automatic Stay Inapplicable and for Relief from the Automatic Stay, Case No. 11-42464-btr-11 (Bankr. E.D. Tex., Oct. 26, 2011) (Exhibit “N” hereto).

²¹ Unless the bankruptcy court’s order is amended or clarified prior to the hearing, for example, AT&T South Carolina anticipates that it will not ask the Commission to determine any actual amount of damages that may be due. Instead, AT&T South Carolina anticipates that it will simply ask the Commission to determine that Halo is responsible to pay applicable access charges. Liquidation of those amounts and other payment issues will presumably be dealt with in the bankruptcy court.

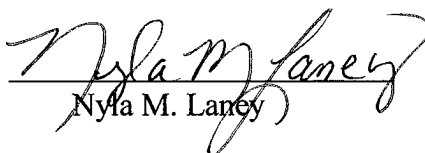
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